Sanctioning Mutilation: The Impact of North Carolina's Medical Necessity Exception to Its Statute on Female Genital Mutilation on Intersex Children*

For far too long, the law has failed to provide for the protection of children with intersex traits through specifically targeted legislation. North Carolina is no different. Consequently, some of the state's most vulnerable find themselves subject to genital-normalizing procedures that have profound mental and physical consequences. In response to these concerns, existing research has proposed that female genital mutilation statutes can, and should, be used as a means of protecting intersex children from coercive and unnecessary operations. However, like many states, North Carolina's female genital mutilation statute contains a harmful "medical necessity" exception that permits doctors to exercise discretionary authority to circumvent the statute's intended protections. This Comment proposes that North Carolina adopt the approach of states like Rhode Island and eliminate the "medical necessity" exception in its statute to provide additional protection for intersex children and stop the State from sanctioning mutilation.

> "*Strictly cosmetic*. *Necessary*. A strange knot in the conflict between those two statements. All of our bodies a strange knot."[1]

INTRODUCTION

Jackey, a child born with intersex[2] traits, was subjected to a series of procedures[3] to construct a phallus when she was just eleven months old.[4] Jackey's parents were told by doctors that if she was not operated on it "would be traumatic for [her] to grow up looking different," so her parents agreed.[5] Jackey's surgery has had perverse effects on her life, which her parents describe as "not . . . easily undone."[6] Unfortunately, Jackey is not alone and her story is not uncommon.[7] Just as Jackey's parents were informed of the "necessity" of operating on their child, other parents of intersex children have recounted also

1. Aaron Apps, *I Emerge into the Hands of an Obstetrician*, *in* INTERSEX: A MEMOIR 30, 31 (2015) (emphasis in original).

2. Persons born with intersex traits use a wide variety of terms to describe their individual identities. This Comment elects to use the term "intersex," as many individuals within the intersex community have recognized this term as "the least stigmatizing option." INTERACT & LAMBDA LEGAL, PROVIDING ETHICAL AND COMPASSIONATE HEALTH CARE TO INTERSEX PATIENTS: INTERSEX-AFFIRMING HOSPITAL POLICIES 4 (2018), https://interactadvocates.org/wp-content/uploads/2018/09/interACT-Lambda-Legal-intersex-hospital-policies.pdf [https://perma.cc/RNK6-L6L8]. However, it is important to acknowledge that persons born with intersex traits should have the autonomy to use whichever terms they feel most comfortable with when describing their bodies and personal experiences.

3. As discussed below, many intersex people are forced to undergo such procedures by doctors seeking to conform their genitals to those traditionally associated with the male/female binary. *See infra* text accompanying notes 52–55. I describe such procedures using the terms female genital mutilation ("FGM") and/or genital-normalizing surgery ("GNS"). I wish to draw a distinction between FGM/GNS and the ability for transgender minors to seek gender-affirming care. While the former is inherently coercive and often, if not always, takes place without the consent of the child who receives it, the latter is elective, desired by the people who seek it, and can be lifesaving. This Comment is limited to the impact of FGM/GNS on intersex children, and none of the arguments advanced should be construed as endorsing restrictions on gender-affirming surgeries.

4. *See* HUM. RTS. WATCH, "I WANT TO BE LIKE NATURE MADE ME": MEDICALLY UNNECESSARY SURGERIES ON INTERSEX CHILDREN IN THE US 74 (2017), https://www.hrw.org/sites/default/files/report_pdf/lgbtintersex0717_web_0.pdf [https://perma.cc/P7NS-48P9].

5. *Id.* at 75.

6. Such "perverse effects" in Jackey's case include mental and physical trauma as well as severe gender dysphoria upon awareness of her identity as a woman. *Id.*

7. While Jackey's story is striking, it truly is just one of many—far too many to recount within the limited confines of this Comment. For an in-depth discussion of the experience of intersex persons subjected to genital-normalizing surgeries (among countless other challenges) throughout United States history, see generally ELIZABETH REIS, BODIES IN DOUBT: AN AMERICAN HISTORY OF INTERSEX (2d ed. 2021).

facing "constant pressure" from doctors to operate—including parents here in North Carolina.[8]

In North Carolina, an intersex activist named Sean Saifa Wall was also the victim of traumatizing—and medically unnecessary—procedures as a child.[9] Sean was born intersex with what he describes as "undescended testes."[10] While Sean was not initially operated on at birth, he recounts a nearly *thirteen-year showdown* between his mother and doctors, which ultimately resulted in an operation to remove his testes when he was a teenager.[11] Following Sean's operation, he spent *two years* under the care of doctors who attempted to ascertain whether the surgery, and subsequent hormone therapy, had been successful in effectively "normalizing" him.[12] In particular, Sean recounts events following his operation, after which he was expected to present as female, where doctors frequently asked questions to ascertain whether he was now "less gay" as a result of the procedure.[13]

For far too long, the state of North Carolina and the United States as a whole have failed to provide sufficient protections for intersex children subject to procedures like the ones that were performed on Sean and Jackey.[14] Such procedures have profound negative impacts on intersex persons later in life. These impacts are both mental and physical, including the inability to form sexual and reproductive identities, the failure to receive sexual pleasure or have children, as well as scarring and pain.[15] Ultimately, nothing medically positive has been shown to result from such operations.[16]

8. *See* HUM. RTS. WATCH, *supra* note 4, at 76; *see also* Kate Sosin, *After Years of Protest, a Top Hospital Ended Intersex Surgeries. For Activists, It Took a Deep Toll.*, 19TH (Aug. 5, 2020, 7:00 AM), https://19thnews.org/2020/08/intersex-youth-surgeries-top-hospital-ended-intersex-activists/ [https://perma.cc/L5J5-SNNF] (recounting doctors' almost thirteen-year insistence that an intersex child undergo procedures to normalize their body).

9. *See* Sosin, *supra* note 8.

10. *Id.*

11. *See id.*

12. *See id.*

13. *Id.*

14. *See* Juan Carlos Jorge, Leidy Valerio-Pérez, Caleb Esteban & Ana Irma Rivera-Lassen, *Intersex Care in the United States and International Standards of Human Rights*, 16 GLOB. PUB. HEALTH 679, 679 (2021) (asserting that the United States medical establishment "does not meet international standards of human rights" concerning protection of intersex persons).

15. *See* REIS, *supra* note 7, at 166; *see also* JULIE A. GREENBERG, INTERSEXUALITY AND THE LAW 21–24 (2012).

16. *See* SHARON E. PREVES, INTERSEX AND IDENTITY: THE CONTESTED SELF 58 (2003).

Consequently, in the absence of much, if any, directly protective intersex-specific legislation, scholars have proposed alternative solutions.[17] One such potential solution is the use of female genital mutilation ("FGM") statutes to protect intersex children.[18] These statutes generally provide protection against the practice of FGM, which is defined as "the partial or total removal of external female genitalia or other injury to female genital organs."[19] Overall, FGM is considered to be harmful and lacks any affirmative "health benefits," leading to its rightful international recognition as a violation of human rights.[20] North Carolina, along with the vast majority of other states, criminalizes the practice of FGM through broadly worded statutes.[21]

Literature explicitly identifying the successful use of FGM statutes to protect intersex children in practice, both within North Carolina and elsewhere, is limited. However, the comparison of FGM to surgeries on intersex children is not novel. Rather, the incredible similarities between the two practices have led scholars to frequently equate the two.[22] In fact, surgery on intersex children has been termed by some as the "western version" of FGM.[23] Thus, in many circumstances, intersex children fall squarely within the protection of FGM statutes and such statutes can, *and should*, be used to prevent medically unnecessary surgeries on intersex individuals.[24]

17. *See, e.g.*, Sylvan Fraser, *Construing the Female Body: Using Female Genital Mutilation Law To Address Genital-Normalizing Surgery on Intersex Children in the United States*, 9 INT'L J. HUM. RTS. HEALTHCARE 62, 69 (2016) (asserting that statutes prohibiting FGM may possibly apply to certain cases of GNS in the United States and protect children born with intersex-presenting traits as a result).

18. *Id.*

19. *Female Genital Mutilation: Overview*, WORLD HEALTH ORG., https://www.who.int/health-topics/female-genital-mutilation [https://perma.cc/E7KS-QUGB].

20. *Id.*; *see also* 140 CONG. REC. 27941, 27942 (1994) (reflecting the views of several United States senators, including Senator Paul Wellstone, during floor debate on passage of the country's national FGM law, that the practice is a "horrific form of child abuse").

21. *See infra* note 82 (listing the states that criminalize FGM).

22. Afshan Jafar, Opinion, *The Thin Line Between Surgery and Mutilation*, N.Y. TIMES (May 2, 2019), https://www.nytimes.com/2019/05/02/opinion/fgm-ruling-intersex-surgery.html [https://perma.cc/PZK6-R754 (staff-uploaded, dark archive)] (noting the significant overlap between FGM and surgery on intersex children, including practices like "clitoroplasty, clitoral reduction and labiaplasty" as well as the perceived need for "normalizing").

23. *See* Melinda Jones, *Intersex Genital Mutilation—A Western Version of FGM*, 25 INT'L J. CHILD.'S RTS. 396, 397 (2017).

24. *See* Fraser, *supra* note 17. For example, the language of North Carolina's FGM statute broadly states that "[a] person who knowingly and unlawfully circumcises, excises, or infibulates the whole or any part of the labia majora, labia minora, or clitoris of a child less than 18 years of age is guilty of a Class C felony." *See* N.C. GEN. STAT. § 14-28.1(b) (LEXIS through Sess. Laws 2023-111 of the 2023 Reg. Sess. of the Gen. Assemb.).

Accordingly, North Carolina's FGM statute would seem to provide protection for many intersex children in the state. However, the reach of North Carolina's statute is severely limited by certain exceptions, including the "medical necessity" exception.[25] This exception operates as a loophole, hindering North Carolina's FGM statute from otherwise adequately protecting intersex children. Ultimately, through this exception, medical professionals are permitted to circumvent the statute's direct provisions and appeal to discretionary determinations of what qualifies as a "health benefit[]," which legitimizes the mutilation of intersex children in North Carolina who would otherwise be protected by this statute.[26]

Accordingly, the goal of this Comment is threefold. First, this Comment seeks to investigate existing research concerning the use of FGM statutes in North Carolina and elsewhere as a means of protecting intersex children from coercive and unnecessary operations in the absence of other directly protective, intersex-specific legislation. Second, this Comment evaluates the potentially adverse impact on intersex children of an exception contained within the North Carolina FGM statute. This exception broadly permits operations resulting in FGM where they are determined, based on a doctor's independent assessment, to be "medically necessary" to the health of the child, without defining this term. Third, in the absence of more directly protective legislation concerning intersex children, this Comment supports the adoption of more explicit language in North Carolina's FGM statute that would fully eliminate any "medical necessity" exception.

Ultimately, such a change would provide better protection for intersex children while having no adverse effect on other non-intersex groups that are also protected by the statute. Further, it would recognize that FGM is a "violation of a child's right to health, and in some instances, the right to life" by "permanently impair[ing] and degrad[ing] . . . sexual organs," and, as such, should be prohibited.[27]

In order to achieve this goal, this Comment proceeds in six parts. Part I provides relevant background information on intersex identity and the pervasive and continuing prevalence of genital-normalizing surgeries ("GNS") in North Carolina and the rest of the United States.

25. *See infra* note 83 and accompanying text.

26. *See* Brian D. Earp, Arianne Shahvisi, Samuel Reis-Dennis & Elizabeth Reis, *The Need for a Unified Ethical Stance on Child Genital Cutting*, 28 NURSING ETHICS 1294, 1295–300 (2021).

27. Karen Hughes, Note, *The Criminalization of Female Genital Mutilation in the United States*, 4 J.L. & POL'Y 321, 352 (1995).

Part II outlines a brief overview of FGM statutes and their history, before discussing the proposed theory by some scholars that such statutes are applicable to intersex children. This part then examines the relevant North Carolina FGM statute and situates it in context.

Part III explores the so-called "medical necessity" exception to FGM statutes. In particular, this part discusses the potentially adverse implications of North Carolina's vaguely worded exception—which has the potential to allow doctors to wield incredible discretionary power in performing unnecessary operations on intersex children.

Part IV considers the language used by other states in crafting "medical necessity" exceptions. Specifically, this part evaluates the potential strengths and weaknesses of the different approaches that states have taken regarding FGM "medical necessity" exceptions through the lens of Rhode Island's and South Carolina's FGM statutes.[28]

Part V advocates for a statutory change whereby North Carolina adopts language eliminating the "medical necessity" exception in its FGM statute. This much-needed change will limit unnecessary doctor discretion and provide greater protection for intersex children in North Carolina.

Finally, Part VI discusses the implications such a change may have on the state statute's protection of children who do not have intersex traits. This part argues that such a change also provides a needed benefit to other groups that are protected under the state's statute.

I. BACKGROUND

A. *Intersex: Definition and Challenges*

The number of children born with intersex traits is significant—approximately one in 2,000 children are born with intersex traits each year.[29] This means that there are approximately 5,300 intersex individuals currently

28. Each of these states' statutes presents an option at either end of a spectrum. Rhode Island's statute does not include any "medical necessity" exception at all. 11 R.I. GEN. LAWS § 11-5-2(c)(3) (LEXIS through chapter 254 of the 2023 Sess. (except chapters 61–62, 79), not including all corrections and changes by the Director of Law Revision). Conversely, South Carolina's statute exclusively limits "medical necessity" to physical health. S.C. CODE ANN. § 16-3-2230(B)(1) (Westlaw through 2023 Act No. 102, subject to final approval by the Legis. Council, technical revisions by the Code Commissioner, and publication in the Official Code of Laws). The specifics of both statutes are discussed in greater detail in Part IV.

29. Chanika Phornphutkul, Anne Fausto-Sterling & Philip A. Gruppuso, *Gender Self-Reassignment in an XY Adolescent Female Born with Ambiguous Genitalia*, 106 PEDIATRICS 135, 136 (2000).

living in North Carolina.[30] However, a lack of routine collection of demographic data on intersex status—as well as a normative societal view of sex as binary—makes this number difficult to calculate with certainty.[31]

Persons born with intersex traits often exhibit "unique variations in reproductive or sex anatomy" which can result in differences appearing "in a person's chromosomes, genitals, or internal organs."[32] Accordingly, genetic and nongenetic factors can contribute to certain differences, chromosomal or otherwise, in some fetuses.[33] Historically, intersex traits have been divided into four distinct categories.[34] However, scholars have more recently begun to acknowledge that intersex traits and "human biological variation," generally "transcend[] the limitations of biological typology" and cannot be easily categorized.[35]

Thus, it may be easy, or even instinctual, for medical professionals to designate people as intersex based on the presence of certain specific biological characteristics. Historically, these variations or traits have been treated as

30. The exact number of intersex individuals living in North Carolina is not a readily available figure. This estimate was calculated using information provided by the North Carolina Department of Health and Human Services 2020 Vital Statistics Report. *See* N.C. DEP'T OF HEALTH & HUM. SERVS., NORTH CAROLINA: SELECTED VITAL STATISTICS FOR 2020 AND 2016–2020 (2022), https://schs.dph.ncdhhs.gov/data/vital/volume1/2020/2020-Volume1-NC-StateTable.pdf [https://perma.cc/P5Z3-T59M] (reporting that as of the end of 2020 North Carolina's total population was 10,600,823).

31. *See* Kellan E. Baker, Carl G. Streed, Jr. & Laura E. Durso, *Ensuring That LGBTQI+ People Count—Collecting Data on Sexual Orientation, Gender Identity, and Intersex Status*, 384 NEW ENG. J. MED. 1184, 1184 (2021); HUM. RTS. WATCH, *supra* note 4, at 5. However, activists estimate that the number of children born with intersex traits in a given year is much higher than is reported and actually totals—at a minimum—two percent of the global population. *See* Getting Curious with Jonathan Van Ness, *How Can We Put the "I" in LGBTQIA+?*, at 04:45 (Nov. 10, 2021), https://podcasts.apple.com/us/podcast/how-can-we-put-the-i-in-lgbtqia-with-alicia-roth-weigel/id1068563276?i=1000541302609 [https://perma.cc/NJ7P-8KFA].

32. *Intersex Definitions*, INTERACT, https://interactadvocates.org/intersex-definitions/ [https://perma.cc/RTZ8-9NAQ] (last updated Feb. 19, 2021).

33. *See* Stephanie Dutchen, *The Body, the Self*, HARV. MED., Winter 2020, https://magazine.hms.harvard.edu/articles/body-self [https://perma.cc/G6D2-FWQ3].

34. *Intersex*, MEDLINEPLUS MED. ENCYCLOPEDIA, https://medlineplus.gov/ency/article/001669.htm [https://perma.cc/RQ6V-EZJQ] (last updated Aug. 10, 2021). The four groups are defined as "46, XX intersex"; "46 XY intersex"; "[t]rue gonadal intersex"; and "[c]omplex or undetermined intersex." *Id.*

35. *See* Goran Štrkalj & Nalini Pather, *Beyond the Sex Binary: Toward the Inclusive Anatomical Sciences Education*, 14 ANATOMICAL SCIS. EDUC. 513, 513 (2020) (recommending that medical student curricula adopt a broader instructional practice in order to provide an improved framework for understanding human biological variation).

requisite or "needed" for a person to be deemed intersex.[36] However, this process is far more normative than scientific, and its implications are complex and far-reaching.

Often, there is no single uniform clinical practice to determine whether or not intersex traits are present in a child at birth.[37] In fact, while many intersex traits are identifiable at birth, some remain unidentifiable until a child is older.[38] Accordingly, some medical researchers have noted that the process should require multidisciplinary coordination in assessment.[39] In support of this argument, researchers assert that a multidisciplinary team approach is "necessary to make an accurate diagnosis" as well as to respond to the "psychosocial[] and developmental needs of the growing child."[40]

B. *Genital Normalization Through Surgical Intervention*

Despite the biological complexities outlined above, children born with intersex traits are still typically assigned a binary sex, male or female, by doctors at the time of their birth.[41] Once sex is assigned, surgical techniques are often used to "normalize" the child's genitalia.[42] This process has been referred to as

36. *See* COMM. ON MEASURING SEX, GENDER IDENTITY & SEXUAL ORIENTATION, NAT'L ACADS. OF SCIS. ENG'G & MED., MEASURING SEX, GENDER IDENTITY, AND SEXUAL ORIENTATION 139–40 (Nancy Bates, Marshall Chin & Tara Becker eds., 2022).

37. *See* Maria L. Iezzi, Stefania Lasorella, Gaia Verriale, Luca Zagaroli, Michela Ambrosi & Alberto Verroti, *Clitoromegaly in Childhood and Adolescence: Behind One Clinical Sign, a Clinical Sea*, 12 SEXUAL DEV. 163, 164 (2018) ("[C]litoromegaly [abnormal enlargement of the clitoris] is diagnosed when the crosswise glans is >5 mm between 0–3 years."). *But see* SUZANNE J. KESSLER, LESSONS FROM THE INTERSEXED 43 (1998) (classifying a "medically acceptable" clitoris as anything less than one centimeter).

38. INTERACT, *supra* note 32.

39. Katherine Kutney, Laura Konczal, Beth Kaminski & Naveen Uli, *Challenges in the Diagnosis and Management of Disorders of Sex Development*, 108 BIRTH DEFECTS RSCH. 293, 300 (2016) (suggesting that care be coordinated among the "pediatric endocrinologist, geneticist, pediatric urologist/surgeon . . . adolescent gynecologist, [and] pediatric radiologist" among others).

40. *Id.* at 300, 304.

41. *See* Julie Greenberg, *Legal Aspects of Gender Assignment*, 13 ENDOCRINOLOGIST 277, 277 (2003). Of note, some states—such as California—have tried in recent years to permit folks to change the gender on their birth certificate to "non-binary" later in their lives. *See* CAL. HEALTH & SAFETY CODE § 103430 (Westlaw through Chapter 1 of 2023–24 1st Extraordinary Sess., and all laws through Chapter 890 of 2023 Reg. Sess.). Conversely, the American Medical Association has recently recommended the removal of sex designations from the public portion of birth certificates altogether. *See* BD. OF TRS., AM. MED. ASS'N, REPORT OF THE BOARD OF TRUSTEES: REMOVING THE SEX DESIGNATION FROM THE PUBLIC PORTION OF THE BIRTH CERTIFICATE (RESOLUTION 5-1-19), at 1 (2021), https://www.ama-assn.org/system/files/2021-05/j21-handbook-addendum-ref-cmte-d.pdf [https://perma.cc/8XWA-X92Y].

42. *See* Greenberg, *supra* note 41, at 279.

genital-normalizing surgery.[43] GNS can—and often does—include practices such as "clitoral reduction, vaginoplasty (formation of vagina) and removal of testicles."[44]

Widespread guidance by advocacy organizations asserts that GNS should not be performed when the operation's only goal is to reinforce binary gender assignment.[45] Such procedures violate intersex individuals' right to self-determination regarding "bodily shape, identity, and being."[46] Despite this, GNS in response to the discovery of intersex traits has nonetheless been described by many clinicians and researchers as a necessary early intervention to protect the "health" of intersex children.[47] This is largely driven by the view that the presence of intersex traits at birth is considered to be a "medical emergency."[48]

Admittedly, in a few exceptionally rare instances, some procedures on an intersex child could be needed in order to repair that child's internal bladder or remove abnormal structures that are at high risk for malignancy.[49] However, it is almost always the case that these procedures can be undertaken much later in the child's life, after puberty, and need not occur soon after birth.[50] In fact, it is more often the case that an operation on an intersex child actually has *detrimental physical effects*, including issues with urine retention and incontinence, difficulties with childbirth, and the need for lifelong hormone

43. *See* Anne Tamar-Mattis, *Exceptions to the Rule: Curing the Law's Failure To Protect Intersex Infants*, 21 BERKELEY J. GENDER L. & JUST. 59, 60 (2006). Some clinicians and researchers may elect to use the term "intersex surgeries" in reference to operations on intersex persons. *See generally* Kevin G. Behrens, *A Principled Ethical Approach to Intersex Paediatric Surgeries*, 21 BMC MED. ETHICS 108 (2020) (providing an example of researchers electing to use the term "intersex surgeries"). However, the term genital-normalizing surgery has been intentionally selected for use throughout this Comment in order to emphasize the fact that surgery performed on persons with intersex traits is often done with the sole aim of constructing genitalia to resemble that which is typical for assigned (binary) sex—or to engage in what is often considered "normalizing."

44. Edmund M. Horowicz, *Intersex Children: Who Are We Really Treating?*, 17 MED. L. INT'L 183, 184 (2017).

45. *See* CONSORTIUM ON THE MGMT. OF DISORDERS OF SEX DEV., CLINICAL GUIDELINES FOR THE MANAGEMENT OF DISORDERS OF SEX DEVELOPMENT IN CHILDHOOD 28 (2006), https://dsdguidelines.org/files/clinical.pdf [https://perma.cc/8Q3N-8AQ3].

46. REIS, *supra* note 7, at 154.

47. *See* Kutney et al., *supra* note 39, at 303.

48. PREVES, *supra* note 16, at 58.

49. *See* Caroline Lowry, Note, *Intersex in 2018: Evaluating the Limitations of Informed Consent in Medical Malpractice Claims as a Vehicle for Gender Justice*, 52 COLUM. J.L. & SOC. PROBS. 321, 328 (2018).

50. *See id.*

therapy.[51] Thus, the risks of performing surgery on intersex children at birth outweigh any perceived "medical necessity."

Ultimately, the "medical emergencies" spoken of by operating physicians are rarely, if ever, rooted in legitimate physical health concerns. Rather, the motive for GNS is most often to reduce what the operating physician perceives as potential "social discomfort" and is physically unnecessary.[52]

Consequently, physicians often engage in discretionary determinations of whether or not the presence of intersex characteristics will negatively impact the mental health of a child without considering whether or not an operation is physically necessary.[53] As a result, parents are typically poorly informed about the true "need" for the surgery and its effects, resulting in pressure by physicians to consent.[54] For example, researcher Kenneth Kipnis recounts discussions with pediatric surgeons where clinicians discuss the weight they place on allowing "the infant to enjoy a better and more normal life."[55] However, a desire to reduce perceived social discomfort should not be a consideration made by physicians at all.

The assertion that GNS acts to improve the mental health of intersex children is completely and totally inaccurate.[56] Rather, research indicates that intersex youth who are subjected to conversion efforts by a healthcare professional, such as attempts to convince them to undergo GNS, suffer "more

51. Hughes, *supra* note 27, at 363.

52. *See* PREVES, *supra* note 16, at 58 (identifying the motives for surgical intervention as "predominately social in nature"); *see also* Nora Neus, *Bill Proposed by NY State Senator Would Ban Medically Unnecessary Surgeries on Intersex Children*, CNN, https://www.cnn.com/2019/11/08/health/ny-bill-bans-intersex-surgery-children [https://perma.cc/A5GJ-KRF6] (last updated Nov. 8, 2019, 1:48 PM) ("Many babies born intersex undergo surgery within the first few months of life to bring their bodies in line with a commonly accepted female or male appearance . . . .").

53. *See* PREVES, *supra* note 16, at 57 ("Apprehensive about the possibility of the child being shamed in the boys' locker room[,] . . . the pediatric surgeon . . . counsel[ed] immediate surgical reassignment." (quoting Kenneth Kipnis & Milton Diamond, *Pediatric Ethics and the Surgical Assignment of Sex*, 9 J. CLINICAL ETHICS 398, 398 (1998)).

54. *See* ANNE FAUSTO-STERLING, SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY 64–65 (2000).

55. *See* PREVES, *supra* note 16, at 57–58 (quoting Kenneth & Diamond, *supra* note 53, at 398) ("Despite the fact that most cases of intersexuality are not harmful to the infant's physical health, the medical protocol . . . treats the incident as a medical emergency.").

56. *See, e.g.*, TREVOR PROJECT, THE MENTAL HEALTH AND WELL-BEING OF LGBTQ YOUTH WHO ARE INTERSEX 12 (2021), https://www.thetrevorproject.org/wp-content/uploads/2021/12/Intersex-Youth-Mental-Health-Report.pdf [https://perma.cc/Y6T4-2F52].

than twice the rate of past-year suicide attempts" than intersex youth who have not been subjected to such effort.[57]

Indeed, GNS has been found to result in a variety of serious negative mental and emotional impacts on intersex children later in life. The psychological consequences of GNS can include, at a minimum, severe emotional trauma such as "post-traumatic stress disorder, problems with intimacy, and severe depression."[58] Once they are older, many individuals subjected to GNS recount challenges with developing a sense of self and combatting "feelings of inadequacy and shame" brought on by doctors "thinking they should fix" them.[59]

Notwithstanding the invalidity of physicians' concerns regarding the necessity of GNS to improve the health of intersex children, their discretionary determinations of what is best for the child still carry extraordinary weight when advising parents about what course of action ought to be taken. It has been estimated that GNS occurs in almost every case where it is recommended by the operating physician.[60] Accordingly, based on existing research, it is possible that in North Carolina up to ninety-four percent of intersex children are subjected to medically unnecessary GNS at the advice of a physician.[61]

Consequently, the harms associated with GNS occur most often as the result of physicians interpreting their unfounded fears regarding an intersex child's psychological adjustment as necessitating surgical intervention.[62] Rarely are concerns for the actual health of the child employed as a justification for operation.[63] Instead, doctors base their decisions on which sexual organs to

57. *Id.* at 12. It is important to note that "intersex youth also reported more than twice the rate of having been subjected to conversion efforts by a healthcare professional (9%) compared to LGBTQ youth who are not intersex (4%)." *Id.* at 13.

58. Laura Sundin, *Imposing Identity: Why States Should Restrict Infant Intersex Surgery*, 73 SMU L. REV. 637, 645 (2020).

59. PREVES, *supra* note 16, at 65.

60. *See* N.J. Nokoff, B. Palmer, A.J. Mullins, C.E. Aston, P. Austin, L. Baskin, K. Bernabé, Y.M. Chan, E.Y. Cheng, D.A. Diamond, A. Fried, D. Frimberger, D. Galan, L. Gonzalez, S. Greenfield, T. Kolon, B. Kropp, Y. Lakshmanan, S. Meyer, T. Meyer, L.L. Mullins, A. Paradis, D. Poppas, P. Reddy, M. Schulte, K.J. Scott Reyes, J.M. Swartz, C. Wolfe-Christensen, E. Yerkes & A.B. Wisniewski, *Prospective Assessment of Cosmesis Before and After Genital Surgery*, 13 J. PEDIATRIC UROLOGY 28.e1, 28.e3 (2016); *see also* REIS, *supra* note 7, at 153 (noting that parents often heed physicians' advice due to the "hierarchical" nature of the medical environment).

61. A study has found that GNS was performed in thirty-five out of thirty-seven cases where it was recommended by a physician. *See* Nokoff et al., *supra* note 60, at 28.e3. Such results could suggest a statistical likelihood that GNS occurs in ninety-four percent of cases. *See id.*

62. *See* HUM. RTS. WATCH, *supra* note 4, at 94.

63. *See id.*

remove or reconstruct on non-life-threatening considerations such as normalization.[64] These discretionary determinations contravene doctors' mandate to help—not harm—their patients.[65]

II. A POSSIBLE SOLUTION: FEMALE GENITAL MUTILATION STATUTES

North Carolina law, similarly to the rest of the country, does not explicitly protect intersex children from GNS.[66] Certainly, legislation in North Carolina providing such direct protection for intersex children would be preferable.[67] However, in the absence of any such directly protective legislation, scholars have cleverly proposed that FGM statutes be used to protect intersex children from medically unnecessary surgeries.[68] The similarities between FGM and GNS on intersex children make it clear that many intersex minors fall under the statute's protections.

North Carolina currently criminalizes FGM or, as it is defined in this state, the knowing and unlawful "circumcis[ion], excis[ion], or infibulat[ion]" of the "whole or any part of the labia majora, labia minora, or clitoris of a child less than 18 years of age."[69] The language of North Carolina's FGM statute, which contains an express statement of legislative intent, perhaps suggests that the statute was not originally enacted with its impact on intersex children in mind.[70] However, the plain language of the statute is clear: it encompasses "*any*

64. *See* Kimberly Mascott Zieselman, Opinion, *I Was an Intersex Child Who Had Surgery. Don't Put Other Kids Through This.*, USA TODAY, https://www.usatoday.com/story/opinion/2017/08/09/intersex-children-no-surgery-without-consent-zieselman-column/539853001/ [https://perma.cc/PAX7-7VU4] (last updated Aug. 10, 2017, 6:56 AM) (providing a firsthand account of an individual who was born with intersex-presenting traits and subjected to medically unnecessary GNS at the advice of a doctor so that she could grow up to be "normal"); FAUSTO-STERLING, *supra* note 54, at 80 (noting that surgery on intersex persons "is cosmetic surgery performed to achieve a social result").

65. *See* STEDMAN'S MEDICAL DICTIONARY 716–17 (25th ed. 1990) (explaining that the Hippocratic Oath requires doctors to act first and foremost for the benefit of the patient and to "never do harm to anyone").

66. *See* HUM. RTS. WATCH, *supra* note 4, at 145 ("US laws do not specifically protect children against such abusive operations . . . .").

67. *See* Neus, *supra* note 52 (discussing the positive implications for intersex children that could result from passing proposed legislation that would seek to directly ban unnecessary surgeries on the group).

68. Fraser, *supra* note 17, at 69; *see also* HUM. RTS. WATCH, *supra* note 4, at 149.

69. N.C. GEN. STAT. § 14-28.1(b) (LEXIS through Sess. Laws 2023-111 of the 2023 Reg. Sess. of the Gen. Assemb.).

70. *Id.* § 14-28.1(a) ("The General Assembly finds that female genital mutilation is a crime that causes a long-lasting impact on the victim's quality of life and has been recognized internationally as a violation of the human rights of girls and women.").

procedure that intentionally alters or injures" the above-mentioned genital organs.[71]

The fact that intersex children are not explicitly excluded by the legislature under the state's FGM statute is relevant. As evidenced by other existing statutes concerning medical practice in North Carolina, the General Assembly is aware of how to explicitly exempt certain groups or procedures from statutory provisions if they so choose.[72] Accordingly, if the General Assembly had truly intended to exempt intersex children from the state's FGM statute, they likely would have done so expressly. Thus, it follows that GNS resulting in the above criminalized actions is impermissible under North Carolina's FGM statute and falls squarely within its stated legislative purpose.

The applicability of FGM statutes to medically unnecessary surgeries on intersex minors is further exhibited by the striking similarities between FGM generally and GNS on intersex children. The arrest of a Michigan physician in 2017 under the federal FGM statute can be seen as an example of these similarities.[73] While most charges brought against the physician were eventually dismissed, this prosecution, which was the first of its kind in the country, is relevant because it has led medical practitioners to draw increasing attention to the striking parallels between FGM and GNS.[74] The doctor arrested in this case, Jumana Nagarwala, described the procedure she performed as an attempt to avoid exposing the affected children to potential "social exclusion."[75]

71. *Id.* (emphasis added).

72. *See, e.g.*, N.C. GEN. STAT. § 90-21.5(a) (LEXIS) (listing certain procedures and circumstances which are not authorized by the state's minor consent statute).

73. *See* Jacey Fortin, *Michigan Doctor Is Accused of Genital Cutting of 2 Girls*, N.Y. TIMES (Apr. 13, 2017), https://www.nytimes.com/2017/04/13/us/michigan-doctor-fgm-cutting.html [https://perma.cc/BH74-EEUC (staff-uploaded, dark archive)].

74. *See* Mark Hicks, *Judge Dismisses Most Serious Remaining Charge Against Doctor Accused of Genital Mutilation*, DETROIT NEWS (Mar. 5, 2020, 12:05 AM), https://www.detroitnews.com/story/news/local/michigan/2020/03/05/judge-dismisses-charge-against-doctor-female-genital-mutilation/4960323002/ [https://perma.cc/Z4EX-A3JF]; *see also* I.W. Gregorio, *Should Surgeons Perform Irreversible Genital Surgery on Children?*, NEWSWEEK (Apr. 26, 2017, 6:10 AM), https://www.newsweek.com/should-surgeons-perform-irreversible-genital-surgery-children-589353 [https://perma.cc/M7XD-ZE9Y] (discussing the similarities between the charges brought against the doctor in this case and "what some surgeons in the U.S. do [to intersex children] every year").

75. *See* Masood Farivar, *US Doctor Arrested in Michigan on FGM Charges*, VOA (Apr. 14, 2017, 12:07 AM), https://www.voanews.com/a/us-doctor-arrested-fgm-charges/3809407.html [https://perma.cc/NJ8T-UHZM]; *see also* Tresa Baldas, *Feds: Doctor in Female Genital Mutilation Case Part of Secret Network Who Cut Girls*, DETROIT FREE PRESS, https://www.freep.com/story/news/local/michigan/detroit/2021/09/16/female-genital-mutilation-network-jumana-nagarwala/8357697002/ [https://perma.cc/RN93-KS88] (last updated Sept. 16, 2021, 8:56 PM).

Accordingly, it is clear that both operations—FGM and GNS—are rooted in harmful cultural practices and a desire for normalization.[76] In particular, scholars note both the stigma that occurs when an intersex child is "not readily identifiable as male or female" and the preoccupation of some physicians that children who do not undergo FGM will be seen as "dirty" or "promiscuous."[77] Moreover, both operations "reinforce[] gender subordination, as well as subordination based on sexuality, employing heteronormative criteria of success."[78] Thus, the two practices, it is argued, are representations of a similar stigmatization, with the difference being the name of the operation that is performed.[79]

Further, practitioners note the similarity in the physical outcomes of the two operations. Both GNS and FGM "often result in pain, infection, sexual and physical dysfunction" as well as dysphoria, loss of reproductive capability, and permanent disfiguration.[80] These damages are lifelong, and children who undergo such operations recount painful genital scarring that is not outweighed by any alleged "comfort of being raised in a clear gender role."[81] Ultimately, the physical and psychological damage caused by FGM is the same—and just as abhorrent—as that caused by GNS, whether the child is born with intersex-presenting traits or not. The similarities between the two practices make it clear that FGM statutes should be used to protect intersex children who would be subjected to GNS.

Currently, thirty-eight other states, as well as the federal government, criminalize FGM using similar language to North Carolina.[82] Thus, the

76. *See* Nancy Ehrenreich & Mark Barr, *Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of "Cultural Practices,"* 40 HARV. C.R.-C.L. L. REV. 71, 78 (2005).

77. *Id.* at 115.

78. *Id.* at 128.

79. *See id.* at 115.

80. *See id.* at 74; *see also* Kate Haas, *Who Will Make Room for the Intersexed?*, 30 AM. J.L. & MED. 41, 47–48 (2004).

81. *See* Haas, *supra* note 80, at 47–48 ("Her genitals were scarred and painful as a child and she hated to look at them.").

82. *See* 18 U.S.C. § 116; ARIZ. REV. STAT. ANN. § 13-1214(A) (Westlaw through the First Reg. Sess. of the Fifty-Sixth Leg.); ARK. CODE ANN. § 5-14-136 (LEXIS through all legislation of the 2023 Reg. Sess.); CAL. PENAL CODE § 273.4 (Westlaw current with Ch. 1 of 2023–24 1st Ex. Sess., and urgency legislation through Ch. 785 of 2023 Reg. Sess.); COLO. REV. STAT. § 18-6-401 (LEXIS through all legislation from the 2023 Reg. Sess. effective as of June 30, 2023); DEL. CODE ANN. tit. 11, § 780 (LEXIS through 84 Del. Laws, chapters 173, 175–176); FLA. STAT. § 794.08 (2022); GA. CODE ANN. § 16-5-27 (LEXIS through 2023 Reg. Sess.); 720 ILL. COMP. STAT. ANN. 5/12-34 (Westlaw through Pub. Act 103-169 of the 2023 Reg. Sess.); IND. CODE § 35-42-2-10 (2023); IOWA

potential protection that FGM statutes provide to intersex children is incredibly far-reaching. However, one exception lies in the way of full protection for intersex children: provisions for "medical necessity."

III. THE "MEDICAL NECESSITY" EXCEPTION

Although the North Carolina FGM statute has the ability to protect intersex children, such protection is limited. In particular, the North Carolina FGM statute contains a "medical necessity" exception, permitting surgical operations that result in FGM where "[t]he operation *is necessary to the health* of the person on whom it is performed."[83] The use of the "medical necessity" exception in FGM statutes is relatively common. In fact, out of the thirty-nine states that criminalize FGM, almost all include some mention of "medical

CODE § 708.16 (2023); KAN. STAT. ANN. § 21-5431 (Westlaw through laws enacted during the 2023 Reg. Sess. of the Kansas Leg. effective on June 8, 2023); KY. REV. STAT. ANN. § 508.125 (Westlaw through the 2023 Reg. Sess. and the Nov. 8, 2022, election); LA. STAT. ANN. § 14:43.4 (Westlaw through the 2023 First Extraordinary, Reg., and Veto Sess.); MD. CODE ANN., HEALTH-GEN. § 20-601 (LEXIS through all legislation from the 2023 Regular Session of the General Assembly; and including legislative changes ratified by the voters at the November 2022 election); MASS. GEN. LAWS ANN. ch. 265, § 60 (Westlaw through chapter 6 of the 2023 1st Ann. Sess.); MICH. COMP. LAWS § 750.136 (2023); MINN. STAT. § 609.2245 (2022); MO. ANN. STAT. § 568.065 (Westlaw through the end of the 2023 First Regular Session of the 102d Gen. Assemb.); NEV. REV. STAT. § 200.5083 (2023); N.H. REV. STAT. ANN. § 632-A:10-d (Westlaw through chapter 176 of the 2023 Reg. Sess.); N.J. STAT. ANN. § 2C:24-10 (Westlaw through L.2023, chapter 64 and J. Res. No. 10); N.Y. PENAL LAW § 130.85 (McKinney 2023); N.D. CENT. CODE § 12.1-36-01 (LEXIS through all amendments in effect through June 30, 2023, during the Reg. Sess. of the 68th Legis. Assemb.); OHIO REV. CODE ANN. § 2903.32 (LEXIS through File 12 of the 135th Gen. Assemb. (2023–24)); OKLA. STAT. ANN. tit. 21, § 760 (Westlaw through legislation of the First Reg. Sess. of the 59th Leg. (2023) and the First Extraordinary Sess. of the 59th Leg. (2023) effective as of October 1, 2023); OR. REV. STAT. § 163.207(1) (2021); 18 PA. CONS. STAT. § 3132(a) (2023); 11 R.I. GEN. LAWS § 11-5-2(c)(3) (LEXIS through chapter 254 of the 2023 Sess. (except chapters 61–62, 79), not including all corrections and changes by the Director of Law Revision); S.C. CODE ANN. § 16-3-2220(A) (Westlaw through 2023 Act No. 102, subject to final approval by the Legis. Council, technical revisions by the Code Commissioner, and publication in the Official Code of Laws); S.D. CODIFIED LAWS § 22-18-37 (Westlaw through the 2023 Reg. Sess. and Supreme Court Rule 23-17); TENN. CODE ANN. § 39-13-110(j) (LEXIS through 2023 Reg. Sess.); TEX. HEALTH & SAFETY CODE ANN. § 167.001(a) (Westlaw through legislation effective July 1, 2023, of the 2023 Reg. Sess. of the 88th Leg.); UTAH CODE ANN. § 76-5-702(2) (LEXIS through the 2023 Second Spec. Sess. of the 65th Leg.); VT. STAT. ANN. tit. 13, § 3151(b) (LEXIS through all legislation from the 2023 Reg. Sess.); VA. CODE ANN. § 18.2-51.7(A)–(C) (LEXIS through the 2023 Reg. Sess.); W. VA. CODE § 61-8D-3a(a) (2023); WIS. STAT. § 146.35(2) (2021–22); WYO. STAT. ANN. § 6-2-502(a)(v) (LEXIS through 2023 Gen. Sess.).

83. N.C. GEN. STAT. § 14-28.1(e)(1) (LEXIS through Sess. Laws 2023-111 of the 2023 Reg. Sess. of the Gen. Assemb.) (emphasis added).

necessity" in their statutes, as does the federal government.[84] However, the interpretation and execution of the "medical necessity" exception varies widely.[85]

North Carolina, like many other states, words its "medical necessity" exception broadly.[86] The language used by North Carolina's statute, that an operation need only be "*necessary to the health* of the person on whom it is performed" in order to be excepted,[87] is completely discretionary. Health care providers are free to determine what qualifies as "necessary to the health" of a person without any discrete or empirical reference point.

Most often the motivation behind health care providers recommending, and ultimately performing, medically unnecessary GNS on intersex individuals is based on an unfounded belief that such procedures are necessary to normalize the child and make the socialization process easier.[88] These discretionary determinations, which have no legitimate bearing on the health of an intersex

84. Out of the forty total jurisdictions that criminalize FGM (thirty-nine states and the federal government), thirty-seven (including North Carolina) mention some form of a "medical necessity" exception. *See* 18 U.S.C. § 116(b)(1); ARIZ. REV. STAT. ANN. § 13-1214(F) (Westlaw); ARK. CODE ANN. § 5-14-136(e)(1) (LEXIS); CAL. PENAL CODE § 273.4(b) (Westlaw); COLO. REV. STAT. § 18-6-401(1)(b)(III)(A) (LEXIS); DEL. CODE ANN. tit. 11, § 780(d)(1) (LEXIS); FLA. STAT. § 794.08(5); GA. CODE ANN. § 16-5-27(c) (LEXIS); 720 ILL. COMP. STAT. ANN. 5/12-34(b)(1) (Westlaw); IND. CODE § 35-42-2-10(c)(2); IOWA CODE § 708.16(2)(a); KAN. STAT. ANN. § 21-5431(c)(1) (Westlaw); KY. REV. STAT. ANN. § 508.125(4)(a) (Westlaw); LA. STAT. ANN. § 14:43.4(C)(1) (Westlaw); MD. CODE ANN., HEALTH-GEN. § 20-602(a) (LEXIS); MASS. GEN. LAWS ANN. ch. 265, § 60(d) (Westlaw); MICH. COMP. LAWS § 750.136(2)(a); MINN. STAT. § 609.2245(2)(1); MO. ANN. STAT. § 568.065(4)(1) (Westlaw); NEV. REV. STAT. § 200.5083(3)(b); N.H. REV. STAT. ANN. § 632-A:10-d(III)(a) (Westlaw); N.J. STAT. ANN. § 2C:24-10(b)(1) (Westlaw); N.Y. PENAL LAW § 130.85(2)(a); N.D. CENT. CODE § 12.1-36-01(2) (LEXIS); OHIO REV. CODE ANN. § 2903.32(C) (LEXIS); OKLA. STAT. ANN. tit. 21, § 760(B)(1) (Westlaw); OR. REV. STAT. § 163.207(3)(a); 18 PA. CONS. STAT. § 3132(c)(1); S.C. CODE ANN. § 16-3-2230(B)(1) (Westlaw); S.D. CODIFIED LAWS § 22-18-39(1) (Westlaw); TENN. CODE ANN. § 39-13-110(e)(1) (LEXIS); TEX. HEALTH & SAFETY CODE ANN. § 167.001(c)(2) (Westlaw); UTAH CODE ANN. § 76-5-702(5)(b) (LEXIS); VT. STAT. ANN. tit. 13, § 3151(c)(1) (LEXIS); VA. CODE ANN. § 18.2-51.7(D) (LEXIS); W. VA. CODE § 61-8D-3A(b)(1); WIS. STAT. § 146.35(3). There are only two jurisdictions—Rhode Island and Wyoming—that do not feature a "medical necessity" exception at all. *See* 11 R.I. GEN. LAWS § 11-5-2(c)(3) (LEXIS); WYO. STAT. ANN. § 6-2-502(a)(v) (LEXIS).

85. *See, e.g.*, *supra* note 28 (describing the wide variation of the form that "medical necessity" exceptions can take using Rhode Island and South Carolina's statutes as examples).

86. *See* N.C. GEN. STAT. § 14-28.1(e)(1) (LEXIS). For another example of broad wording, see Virginia's statute. VA. CODE ANN. § 18.2-51.7(D) (LEXIS) ("A surgical operation is not a violation . . . if [it] is necessary to the *health* of the person on whom it is performed . . . .") (emphasis added).

87. N.C. GEN. STAT. § 14-28.1(e)(1) (LEXIS) (emphasis added).

88. *See supra* Section I.B.

child—and actually result in negative health impacts later in life[89]—would be permissible considerations under the language of North Carolina's "medical necessity" exception.

Several states expressly limit their "medical necessity" exception to cases where the procedure is solely necessary for the "physical health" of the minor.[90] However, as discussed above, GNS is rarely, if ever, needed to actually ensure the physical health of the individual on whom it is performed.[91] Accordingly, any such exception permitting that consideration would simply provide additional discretionary authority to physicians and further limit statutory protections for intersex children.

Accordingly, the use of "medical necessity" exceptions under FGM statutes opens the door for determinations by health care professionals that are discretionary and rooted in inaccurate beliefs about what is truly "necessary" for the health of a child. By allowing providers to make such discretionary determinations, "medical necessity" exceptions ultimately serve as an impediment to the protection of intersex minors. Accordingly, North Carolina's FGM "medical necessity" exception wholly fails intersex children who would otherwise be protected from the harms of GNS. The exception must be eliminated.

89. *See* TREVOR PROJECT, *supra* note 56, at 12.

90. *See* ARK. CODE ANN. § 5-14-136(e)(1) (LEXIS through all legislation of the 2023 Reg. Sess.); GA. CODE ANN. § 16-5-27(c) (LEXIS through 2023 Reg. Sess.); IND. CODE § 35-42-2-10(c)(2) (2023); KAN. STAT. ANN. § 21-5431(c)(1) (Westlaw through laws enacted during the 2023 Reg. Sess. of the Kansas Leg. effective on June 8, 2023); LA. STAT. ANN. § 14:43.4(C)(1) (Westlaw through 2023 First Extraordinary, Reg., and Veto Sess.); N.H. REV. STAT. ANN. § 632-A:10-d(III)(a) (Westlaw through Chapter 176 of the 2023 Reg. Sess.); OR. REV. STAT. § 163.207(3)(a) (2021); S.C. CODE ANN. § 16-3-2230(B)(1) (Westlaw through 2023 Act No. 102, subject to final approval by the Legis. Council, technical revisions by the Code Commissioner, and publication in the Official Code of Laws); TENN. CODE ANN. § 39-13-110(e)(1) (LEXIS through the 2023 Reg. Sess.); UTAH CODE ANN. § 76-5-702(5)(b) (LEXIS through the 2023 Second Spec. Sess. of the 65th Leg.). There are several additional states whose "medical necessity" exceptions contain some mention of physical health and thus may be limited to those instances as well; however, these versions of the exception actually might be intentionally directly adverse to intersex individuals by making reference to "anatomical abnormalities" or "cosmetic" procedures without defining these terms. *See* N.D. CENT. CODE § 12.1-36-01(2) (LEXIS through all amendments in effect through June 30, 2023, during the Reg. Sess. of the 68th Legis. Assemb.) ("A surgical operation is not a violation of this section if a licensed medical practitioner performs the operation to correct an anatomical abnormality . . . ."); OKLA. STAT. ANN. tit. 21, § 760(B)(1) (Westlaw through legislation of the First Reg. Sess. of the 59th Leg. (2023) and the First Extraordinary Sess. of the 59th Leg. (2023) effective as of October 1, 2023) ("Is necessary . . . for purposes of cosmetic surgery to repair a defect . . . ."); WIS. STAT. § 146.35(3) (2021–22) (referencing anatomical abnormalities in much the same way as North Dakota).

91. *See supra* Section I.B.

IV. THE RHODE ISLAND AND SOUTH CAROLINA APPROACHES TO "MEDICAL NECESSITY"

In order to understand how North Carolina's FGM statute fails intersex children and how elimination of its "medical necessity" exception would better ensure their protection, it is helpful to examine the construction of FGM statutes in two different states: Rhode Island and South Carolina. These two states represent variations of the "medical necessity" exception at different ends of the spectrum and provide useful legislative histories. In particular, Rhode Island is one of the few states[92] that does not have a "medical necessity" exception at all, and South Carolina is one of the few states that defines its "medical necessity" exception explicitly in terms of only physical health.[93] Thus, the different approaches that these two states have undertaken in crafting "medical necessity" exceptions provide useful context for how North Carolina should proceed.

A. *Rhode Island*

Similar to North Carolina, Rhode Island has a statute criminalizing the practice of FGM.[94] However, Rhode Island's protection from FGM differs from other states in that its provisions are included in the state's felony assault statute.[95] Moreover, unlike North Carolina, Rhode Island's statute contains no mention of a "medical necessity" exception.[96] Rather, the statute simply describes its criminalization of FGM, like many other states, by prohibiting any procedure which "circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of a person."[97] Any individual who commits a felony under this statute can receive a sentence of up to twenty years in prison if convicted.[98] Thus, the plain language of the statute would seem to indicate that any circumcision, excision, or infibulation, for any reason, regardless of "medical necessity," would be impermissible.

92. *See supra* note 82 and accompanying text.

93. *See supra* note 84 and accompanying text.

94. 11 R.I. GEN. LAWS § 11-5-2(c)(3) (LEXIS through Chapter 254 of the 2023 Sess. (except chapters 61–62, 79) not including all corrections and changes by the Director of Law Revision).

95. *Id.* § 11-5-2.

96. *Compare* N.C. GEN. STAT. § 14-28.1(e)(1) (LEXIS through Sess. Laws 2023-111 of the 2023 Reg. Sess. of the Gen. Assemb.) (explicitly recognizing a "medical necessity" exception to the practice of FGM as defined in the statute), *with* 11 R.I. GEN. LAWS § 11-5-2(c)(3) (LEXIS) (containing no mention of a "medical necessity" exception to the practice of FGM).

97. 11 R.I. GEN. LAWS § 11-5-2(c)(3) (LEXIS).

98. *Id.* § 11-5-2(a).

The absence of a "medical necessity" exception in Rhode Island's statute provides an alternative solution to the negative implications on intersex children caused by North Carolina's overbroad exception. Without a "medical necessity" exception, physicians would be unable to wield any discretionary authority in a way that hinders the protection that FGM statutes provide. Ultimately, the power of physicians to inject their discretionary opinions of what is best for intersex children would be completely removed, providing outright protection for intersex minors from any unnecessary operation.

Concerns have arisen regarding the consequences of removing the "medical necessity" exception, including apprehension regarding whether eliminating such discretionary authority would result in challenges for both intersex children and other groups protected by the legislation. For example, in response to attempts to enact more specific legislation protecting intersex children, some clinical groups have raised issue with a lack of a "medical necessity" exception.[99] In particular, the Societies for Pediatric Urology, in opposing legislation prohibiting GNS without a "medical necessity" exception, has claimed that proposing "a blanket ban on surgery would . . . threaten the care of children."[100]

However, in response to such concerns, clinicians such as Dr. Irene Wong Gregorio, who is herself a practicing urologist, have drawn attention to the fact that "'[i]f a procedure [were] *truly necessary*, . . . if it would *actually alleviate* (physical) suffering . . . ,' it would not be banned under such legislation" and would still be available regardless.[101] This observation is supported by the fact that Rhode Island's lack of an exception does not appear to have resulted in any harm to any group, intersex or otherwise, as evidenced by the lack of legislative action objecting to the statute's construction. In a state where the number of children estimated to be at risk of FGM or GNS is well over 1,000, it is likely that any such concerns, if they existed, would have been voiced in the courts.[102] Accordingly, Rhode Island's decision to forgo a "medical necessity" exception appears to have no negative external policy implications for both intersex and non-intersex minors.

99. *See* Neus, *supra* note 52.

100. *Id.*

101. *Id.* (emphasis added).

102. SANCTUARY FOR FAMILIES, FEMALE GENITAL MUTILATION IN THE UNITED STATES: PROTECTING GIRLS AND WOMEN IN THE U.S. FROM FGM AND VACATION CUTTING 22 fig.1 (2013), https://sanctuaryforfamilies.org/wp-content/uploads/sites/18/2015/07/FGM-Report-March-2013.pdf [https://perma.cc/BL3F-A2H7] (finding that the number of children at risk for FGM in the state of Rhode Island is estimated to be around 1,271).

B. *South Carolina*

Similarly to many other states, South Carolina has enacted a statute that makes it a felony for any person to knowingly cause or facilitate the practice of FGM.[103] FGM is defined by the State as "the partial or total removal of the clitoris, prepuce, or labia minora, with or without excision of the labia majora" on a child.[104] A violation of the statute can result in a prison sentence of up to twenty years.[105] South Carolina's FGM statute also contains a version of the "medical necessity" exception that permits the practice where it is "necessary to the *physical health* of the minor."[106]

The meaning of "physical health" appears neither among the provided definitions in the statute nor in case law.[107] However, "physical health" is defined by South Carolina in other contexts; such as, in instances of child abuse or neglect. Here, the State has consistently distinguished physical health as relating to "physical injury."[108] Accordingly, it seems that under South Carolina law the phrase "physical health" is intended to be limited exclusively to protection from physical injury or harm. Based on case law, it seems likely that this interpretation would apply to the state's FGM statute as well.[109]

As a result, the only permissible consideration when evaluating whether a procedure is allowed under South Carolina's FGM statute would be whether a health care professional is able to determine that a procedure would protect a child from physical injury or harm.[110] On the surface, this may seem like a step in the right direction. Constructing the exception in this way may appear to somewhat limit the discretionary authority of an operating physician by confining them to certain criteria and stopping them from engaging in broad, personal considerations of what is truly "necessary."

103. S.C. CODE ANN. § 16-3-2220(A)–(B) (Westlaw through 2023 Act No. 102, subject to final approval by the Legis. Council, technical revisions by the Code Commissioner, and publication in the Official Code of Laws).

104. *Id.* § 16-3-2210(2)(a).

105. *Id.* § 16-3-2220(B).

106. *Id.* § 16-3-2230(B)(1) (emphasis added).

107. *See id.* § 16-3-2210.

108. *See id.* § 16-3-85(B)(2); *see also* State v. Holder, 676 S.E.2d 690, 693 (S.C. 2009) (interpreting South Carolina's statutory definition of physical health as applied under the child abuse or neglect provisions).

109. *See, e.g.*, *Holder*, 676 S.E.2d at 693; State v. Hepburn, 753 S.E.2d 402, 415 (S.C. 2013); State v. Thompson, 802 S.E.2d 623, 630 (S.C. Ct. App. 2017).

110. "Health care professional" is defined by the South Carolina statute as any "individual who is licensed, certified, or otherwise authorized . . . to provide health care." *See* S.C. CODE ANN. § 16-3-2210(3) (Westlaw).

However, as discussed above, GNS and FGM almost never serve to actually advance the physical health of an intersex child.[111] Rather, such procedures are more likely to result in serious physical trauma such as "infection, pain, and discomfort" and the "attendant risk of death (from anesthesia)."[112] Ultimately, because these procedures interfere permanently with an individual's healthy biological functions and often leave them "traumatized *for life*," it is imperative that the utmost care is given to ensuring their protection.[113] Accordingly, permitting clinicians to evaluate, in their personal judgment, what is necessary to preserve the minor's "physical health" does little other than to curtail protection. Thus, the construction of South Carolina's "medical necessity" exception would not serve to better advance the interests of intersex minors. As a result, modifying North Carolina's "medical necessity" exception to conform to South Carolina's would similarly fail to address concerns.

V. NORTH CAROLINA RECOMMENDATIONS

The harm caused by GNS to persons born with intersex traits cannot be overstated, and North Carolina should do everything it can to protect those persons from continued medically unnecessary operations. North Carolina currently has the potential to provide some refuge to intersex persons through its FGM statute. However, in order to ensure that it can do so, it must solve the problems caused by its overbroad "medical necessity" exception.

Adopting an approach similar to Rhode Island—fully eliminating the "medical necessity" exception to North Carolina's FGM statute—would provide the greatest protection to North Carolina's intersex children and would cause no harm to non-intersex minors. The elimination of the state's "medical necessity" exception would greatly reduce—if not completely eliminate—discretionary determinations by physicians that harm intersex minors who would otherwise be protected under the statute.

Moreover, such a change is a natural extension of the legislative intent of North Carolina's FGM statute, which finds that "female genital mutilation is a crime that causes a *long-lasting impact* on the victim's *quality of life*," and would

111. *See* Lowry, *supra* note 49, at 328 ("[M]any of the surgeries undertaken on intersex minors are purely cosmetic and are performed to fix a perceived abnormality.").

112. *See* Ehrenreich & Barr, *supra* note 76, at 128.

113. *See* Lowry, *supra* note 49, at 332 ("[E]arly surgical intervention in the absence of imminent danger to health can interfere permanently with an individual's erotic sensitivity and bodily autonomy, and often leaves patients traumatized *for life*.") (emphasis added).

better serve the General Assembly's stated goal of protecting these "vulnerable victims."[114] If it is truly the General Assembly's intention to protect the vulnerable individuals who seek refuge in North Carolina's FGM statute, then the General Assembly cannot sit idly by while persons with intersex traits are mutilated at the hands of North Carolina physicians acting in accordance with their personal judgment.

Lawmakers have not been shy in the past about eliminating or constraining discretionary determinations caused by the use of "medical necessity" provisions in other contexts, such as with insurance providers.[115] Thus, it stands to reason that enacting such a change in the context of FGM statutes is not beyond the legislative ordinary. By making a small change and eliminating the "medical necessity" exception, the North Carolina General Assembly can have an enormous impact on the lives of thousands of intersex residents.

While a change in the FGM statute itself is preferable for all the reasons outlined above, it is necessary to acknowledge that, given the current composition of the North Carolina General Assembly, amendment is somewhat unlikely—if not impossible—in the immediate future.[116] Consequently, it is equally important that efforts be made to increase awareness of the negative impact of these surgeries on intersex children. The more attention that is drawn to these irreversible harms, the more likely it is that those who perform these surgeries will change their practices. For example, in 2020, the Ann & Robert H. Lurie Children's Hospital in Chicago became the first hospital in the United States to publicly acknowledge the harm that medically unnecessary surgeries

114. N.C. GEN. STAT. § 14-28.1(a) (LEXIS through Sess. Laws 2023-111 of the 2023 Reg. Sess. of the Gen. Assemb.) (emphasis added). Medically unnecessary surgery on intersex children causes "long-lasting impact[s]" on the intersex child's "quality of life" which would place the situation squarely within the General Assembly's stated goal of North Carolina's FGM statute. *See, e.g.*, TREVOR PROJECT, *supra* note 56, at 7 ("[I]ntersex adults may disproportionately experience negative mental health outcomes."); *see also supra* Section I.B.

115. *See* Amy B. Monahan & Daniel Schwarcz, *Rules of Medical Necessity*, 107 IOWA L. REV. 423, 458–59 (2022).

116. Republican lawmakers currently have a supermajority in both chambers of the North Carolina General Assembly. Ethan E. Horton, *NCGA Democrat To Switch Party Affiliations, Giving Republicans a Supermajority*, DAILY TAR HEEL (Apr. 4, 2023), https://www.dailytarheel.com/article/2023/04/city-tricia-cotham-switches-parties-republican-supermajority [http://perma.cc/HD68-TCHG]. Additionally, the Republican supermajority in the North Carolina General Assembly has introduced legislation that is directly adverse to intersex minors. *See Mapping the Intersex Exceptions: Anti-Trans Legislation Across the United States Permits Rights Violations Against Intersex Children*, HUM. RTS. WATCH, https://www.hrw.org/feature/2022/10/26/mapping-the-intersex-exceptions [https://perma.cc/U59U-YEP4].

have caused on intersex individuals, and to pledge to cease performing them in the future.[117]

Thus, as organizations like Physicians for Human Rights and the American Civil Liberties Union have argued, activism is important in cultivating meaningful change.[118] Progress made at Boston Children's Hospital is an example of how prolonged efforts to educate those in power about the harms of unnecessary surgery on intersex children has resulted in positive change.

Particularly, several years ago, Boston Children's Hospital followed the lead of Lurie Children's Hospital in Chicago and decided to change its policy on permitting surgeries on intersex children.[119] This change did not come about on its own. Rather, after years of advocacy and education efforts by groups on the ground who talked directly to physicians and hospital leaders, Boston Children's Hospital changed its policies.[120] As the cases of both Chicago and Boston suggest, public awareness—especially physician awareness—and education on the ground can lead to substantial positive effects and should not be overlooked as a means of effectuating change in North Carolina.

VI. POTENTIAL IMPLICATIONS FOR NON-INTERSEX CHILDREN

As discussed above, a change to North Carolina's FGM statute eliminating the "medical necessity" exception would be a positive step forward in the protection of intersex children. However, such a shift may raise concerns about the effects on non-intersex children and whether they will continue to be adequately protected under the statute.[121] This concern, while legitimate, is not implicated by eliminating the "medical necessity" exception. Overall, changing North Carolina's FGM statute in this way does not negatively impact non-

117. Ashley Pria Persaud, *US Hospital To Stop Harmful Intersex Surgeries on Children*, HUM. RTS. WATCH (Oct. 29, 2020, 2:14 PM), https://www.hrw.org/news/2020/10/29/us-hospital-stop-harmful-intersex-surgeries-children [https://perma.cc/K2D8-RT9L].

118. *See, e.g.*, Press Release, Physicians for Hum. Rts., Unnecessary Surgery on Intersex Children Must Stop (Oct. 20, 2017), https://phr.org/news/unnecessary-surgery-on-intersex-children-must-stop/ [https://perma.cc/GU7T-T34X]; Chase Strangio, *Stop Performing Nonconsensual, Medically Unnecessary Surgeries on Young Intersex Children*, ACLU (Oct. 26, 2017), https://www.aclu.org/news/lgbtq-rights/stop-performing-nonconsensual-medically-unnecessary-surgeries-young-intersex [https://perma.cc/FN4K-MCEN].

119. Kimberly Zieselman, *Boston Children's Hospital's Change on Intersex Surgeries Was Years in the Making*, INTERACT (Oct. 23, 2020), https://interactadvocates.org/boston-childrens-hospital-intersex-surgery/ [https://perma.cc/63J5-X4XV].

120. *Id.*

121. *See, e.g.*, Neus, *supra* note 52.

intersex children but benefits them, since they will also be able to receive protection from harmful genital cutting without fear of discretionary determinations of what is necessary.[122]

Outside of the context of intersex children, physicians have raised the argument that vague "medical necessity" exceptions contained within statutes concerning medical care limit protections and can harm patients.[123] Accordingly, such statutory language has impacts beyond just those who are born with intersex-presenting traits. Thus, eliminating such language in the context of the state's FGM statute would also protect non-intersex children.

CONCLUSION

For far too long, the law has treated individuals with intersex traits poorly and has failed to provide for their protection through specifically targeted legislation. The state of North Carolina is no different. However, North Carolina has the opportunity to follow the lead of states like Rhode Island and eliminate the "medical necessity" exception contained within its FGM statute. Such a change would provide additional protection for intersex children without harming other groups protected under the relevant provisions of that same statute. However, whether or not North Carolina ultimately follows this guidance, it is imperative that those with the ability to do so continue using their voices to push those in power to make a difference.

Nothing can make up for the countless intersex individuals who have been left unprotected and subjected to the trauma of medically unnecessary surgery throughout North Carolina's history. However, the State can begin to right the wrongs of its past by making a relatively small change in legislation that would have an enormous impact in stopping the sanctioning of mutilation—eliminating the "medical necessity" exception from its female genital mutilation statute.

122. *See* Ehrenreich & Barr, *supra* note 76, at 91 (finding that many Western nations—such as the United States—"are not immune from patriarchal cultural practices that involve female genital cutting").

123. *See* Olivia Goldhill, *Vague 'Medical Emergency' Exceptions in Abortion Laws Leave Pregnant People in Danger, Doctors Say*, STAT (May 20, 2022), https://www.statnews.com/2022/05/20/medical-emergency-exceptions-abortion-laws-pregnant-people/ [https://perma.cc/9DTH-JHTA] (noting that "medical emergency" exceptions contained within state abortion laws can impede access to care due to being vaguely defined).

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